

Response to Public Notice Comments on Proposed Modification to Blanket Section 401 WQC (File No. WQC0901)

A Notice of Proposed Modification to Blanket Section 401 Water Quality Certification (WQC) by the Hawaii State Department of Health (DOH) was published in the Honolulu Star Advertiser, The Garden Island, West Hawaii Today, the Hawaii Tribune Herald News, and the Maui News on February 28, 2020. The City and County of Honolulu (CCH), Department of Design and Construction (DDC) and the Department of the Navy, Navy Region Hawaii submitted comments during the 30-calendar day comment period. Below is a summary of the comments and responses from the DOH.

Comments from CCH-DDC, Dated March 25, 2020

CCH-DDC would like to offer support of the draft modified Blanket Section 401 WQC. It offers a streamlined process that will remove unpredictable time delays from the design and construction process while still fully preventing and protecting Hawaii's waters from damaging discharges. CCH-DDC's projects build, repair, or renovate municipal facilities utilized by the public and often exist to protect the public and facilitate vital functions like transportation, storm water drainage, and flood control. The streamlined process proposed in the draft Blanket Section 401 WQC will allow these public projects to move forward with a more predictable schedule and will also save taxpayer money. Further, the conditions of the draft Blanket Section 401 WQC spell out clear Best Management Practices that will help projects protect the environment and prevent discharges of pollutants to state waters.

CCH-DDC would also like to offer suggestions for other Nationwide Permits (NWP) that may be considered for inclusion under the draft Blanket Section 401 WQC, as these NWP have the potential to cover CCH-DDC projects that serve the public: NWP 23, 25, 27, 33, 38, 41, 42, 43, 45, and 54.

DOH Response to CCH-DDC Comments

The DOH appreciates your support of the draft modification to the Blanket Section 401 WQC. DOH only included NWP frequently utilized by the Army Corps of Engineers, Regulatory Branch in Hawaii. DOH will consider these additional NWP in the next Blanket Section 401 WQC.

Comments from the Department of the Navy, Navy Region Hawaii, Dated March 24, 2020

Comment No. 1: When is the New Blanket Section 401 WQC Modifications (2/28/20 letter) anticipated to be finalized?

Response to Comment No. 1: DOH expects to finalize the modifications to the Blanket Section 401 WQC in May or June 2020.

Comment No. 2: We assume this New Blanket Section 401 WQC modification WQC0901.FNL.20 is intended to supersede the previous WQC0901.FNL.18 in full; is this correct? If it is to supplement, what portions of the WQC0901.FNL.18 remains in effect and what portions are superseded?

Response to Comment No. 2: Yes, the modification is intended to supersede the previous Blanket Section 401 WQC in full and in its entirety. This has been clarified in the final modification of the Blanket Section 401 WQC.

Comment No. 3: If / when the 2/28/20 letter is finalized; and assuming it supersedes the previous WQC0901.FNL.18, will applications pending or under current USACE and/or DOH review be automatically subject to the new conditions?

Response to Comment No. 3: Pending applications will be subject to the new conditions as of the issuance/effective date of the modification to the Blanket Section 401 WQC.

Comment No. 4: There appears to be no specific criteria for expiration, revocation or non-compliance; assuming this is due to these factors being tied to the USACE permit for which the Blanket Certification applies?

Response to Comment No. 4: Expiration and non-compliance requirements are in Condition Nos. 1 and 3 of the modification to the Blanket Section 401 WQC, respectively. Also, any project and/or activity that is either covered under the Blanket Section 401 WQC or not covered is subject to Hawaii's water pollution control rules and laws.

Comment No. 5: If the restriction for Blanket Certification coverage extension of 12 month beyond midnight March 18, 2022, as described in WQC0901.FNL.18 does not still apply because the 2/28/20 modification supersedes this, are there specific Blanket Certification criteria and/or limitation for the USACE POH extension process, or would these mirror the extension criteria for the applicable USACE permit?

Response to Comment No. 5: Extending Blanket Certification coverage mirrors the USACE extension process. Condition 1.d of the modification to the Blanket

Section 401 WQC allows for an administrative extension of the WQC coverage when the USACE extends their authorization/verification.

Comment No. 6: How will Blanket Certifications issued prior to this modification be impacted by WQC0901.FNL.20 Condition 1d? Grandfathered in and to extend no more than 12 months beyond midnight, March 18, 2022? Or expire at midnight, March 18, 2022? If an extension can be made, how would one apply for an extension?

Response to Comment No. 6: Projects covered under the previous Blanket Section 401 WQC (WQC0901.FNL.18) will follow the requirements of the modification to the Blanket Section 401 WQC (WQC0901.FNL.20) and are not grandfathered. If the USACE extends their authorization/verification, coverage under the Blanket is extended.

Comment No. 7: We assume this section (Condition 2.a) is intended to identify the NWP's and activities that do not require any CWA Sec 401 certification, including a Blanket Certification (otherwise NWP 1 and 8 would be included in section 2b); is this correct? The Navy supports the inclusion of the 2 NWP's and other activities in 2a. The inclusion of NWP 1 and other activities like directional drilling are important to expediting necessary improvements and/or repairs within JBPHH.

Response to Comment No. 7: Yes, the NWP's and activities in Condition 2.a of the modification to the Blanket Section 401 WQC do not require any Section 401 WQCs, including coverage under the Blanket. Condition 2.a was included to make it clear that DOH is not requiring Section 401 WQCs for these NWP's and activities.

Comment No. 8: Assuming section 2b activities are exempted from all certification under CWA Section 401; if USACE issues a permit (LOP or NWP) to cover only one of the activities listed in 2b, e.g. directional drilling under water body or Coral transplantation, will this automatically require the need for a Blanket Certification as per 2b?

Response to Comment No. 8: The DOH assumes that the commenter is referring to Condition 2.a of the modification to the Blanket Section 401 WQC that list the NWP's and activities that do not require a Section 401 WQC. Any part of the project that is not included in Condition 2.a but needs a permit from the USACE and may result in a water pollutant discharge to State waters, will still require a Section 401 WQC.

If that portion of the project is included in Condition 2.b, the Blanket Section 401 WQC modification can be utilized. If that portion of the project is not included, an individual Section 401 WQC will be required.

Comment No. 9: Are there limitations for any NWP and other activities stated in 2a? For example, for directional drilling is there a minimum drilling depth below the sea floor and/or maximum drilling distance established before this activity is kicked out of 2a? If so, what are those limitations? What happens to those that are kicked out? Do they now qualify for Blanket coverage? Individual coverage?

Response to Comment No. 9: There are no limitations for NWPs and activities listed in Condition 2.a of the modification to the Blanket Section 401 WQC. DOH has decided that these NWPs and activities do not require a Section 401 WQC. The DOH does not anticipate any of those activities to be kicked out.

Comment No. 10: Does the description/requirements for "Automatic Coverage for Emergency Projects" in WQC0901.FNL.18 Blanket WQC apply to 2a project that does not require Section 401 WQC?

Response to Comment No. 10: Yes. The Emergency Projects in the previous Blanket Section 401 WQC (or emergencies proclaimed by the President of the United States or Governor of Hawaii, where HRS Chapter 342D has been suspended) are included in the third bullet of Condition 2.a of the modification to the Blanket Section 401 WQC.

Comment No. 11: Condition 2.a does not require a Section 401 WQC for installation of temporary BMPs with inert material in State waters, excluding material used to divert or dam stream flow. What situations was this intended for? Although borings could clearly fit under Blanket Certification under NWP 5 Scientific Measurement Devices, it could seemingly fit under this description.

Response to Comment No. 11: This condition was only meant for temporary BMPs with inert material that need to be placed in a State water. For example: If a person needed to repair the side of a bridge on land and needed to put BMPs in the stream due to space restrictions, all temporary BMPs made of inert material in the stream will not require a Section 401 WQC. Borings would not be allowed under Condition 2.a as there may be water pollutants that could be discharged to State waters from these types of activities.

Comment No. 12: The Navy supports the inclusion of the 17 NWPs (10 new NWPs and 7 preexisting NWPs) and activities in 2b. The inclusion of NWPs 2, 3, 5, 6, 9, 10, 18, 19, 28, and 35 and other activities covered by a LOP are important to expediting necessary improvements and/or repairs within JBPHH. For all 17 NWP, and LOP without discharge of fill material covered activities; it reads that there will no longer be a requirement for the Applicant to develop a BMP plan as per previous WQC0901.FNL.18 section 3(a); no requirement for the Applicant to notify DOH as per previous WQC0901.FNL.18 Section 4; no requirement for the Applicant to develop a AMAP

(previous section 4(a)(b)(10)) with all the data obligations associated with that, and no requirement for the Applicant to submit e-permitting or a Certification Statement to DOH. In addition, there seems to be no requirement for the Applicant to submit Compliance Reporting as per previous WQC0901.FNL.18 section 5. Is this interpretation correct?

Response to Comment No. 12: Yes [to each point].

Comment No. 13: We assume the Section 401 WQC limitations in paragraph 2.c of the original blanket WQC (WQC0901.FNL.18) have been replaced by the proposed limitations in WQC0901.FNL.20; is this correct? These limitations appear to generally be a little less well defined than the previous limitations as per WQC0901.FNL.18 Section 2(c)(6); e.g. the 2/28/20 letter bullet (4) "concrete lining any section of natural stream bed or bank" appears to be broader and in this case more restrictive than similar limitation as per previous WQC0901.FNL.18 Section 2(c)(6)(c) which provided a 200 LF threshold. Is it correct that there is no longer a 25 cy³ limitation of dredge or fill material?

Response to Comment No. 13: Yes, the modification to the Blanket Section 401 WQC supersedes the previous Blanket Section 401 WQC (WQC0901.FNL.18). Condition 2.c(4) of the modification to the Blanket Section 401 WQC indicates that concrete lining of any section of natural streambed or bank cannot be covered under the Blanket Section 401 WQC. The reason is mentioned in footnote 3 of Condition 2.c(4): "This type of activity is prohibited as it will result in adverse post construction impacts by eliminating ground water recharge, raising pH, and lowering dissolved oxygen or causing downstream bank erosion." Any proposal to concrete line any section of natural streambed or bank that requires a USACE permit, will require an individual Section 401 WQC application (with antidegradation analysis).

The 200 LF threshold from WQC0901.FNL.18 no longer applies. Condition 2.c(4) of the modification to the Blanket Section 401 WQC was included because DOH wants to analyze proposals to concrete line any section of natural streambed or bank in an individual Section 401 WQC application.

The 25 CY limitation of dredge or fill material from WQC0901.FNL.18 no longer applies. It has been removed in the modification to the Blanket Section 401 WQC.

Comment No. 14: DOH email states that a proposed modification is "Removal of Class I / AA and marine bottom type overall restriction." While the modification indicates that a new sewage and industrial discharges to embayments (Class AA and Class A

waters), it doesn't clearly state Class 1/AA waters is no longer an exclusion from coverage under the blanket WQC.

Response to Comment No. 14: Conditions 2.c(7) and (8) of the modification to the Blanket Section 401 WQC do not allow new sewage and industrial discharges to estuaries (Class 1 or 2) and embayments (Class A or AA). Hawaii's Water Quality Standards in Hawaii Administrative Rules (HAR) Chapter 11-54 prohibits new sewage and industrial discharges to estuaries (Class 1 or 2) and embayments (Class A or AA). Condition 2.c of the modification to the Blanket Section 401 WQC was included to restate the prohibition in Hawaii's Water Quality Standards.

Also, the previous Blanket Section 401 WQC specifically excluded Class 1 and AA. The modification to the Blanket Section 401 WQC now includes Class 1 and AA.

Comment No. 15: Assume term "Applicant" is equivalent to "Owner"

Response to Comment No. 15: The Applicant is anyone applying for coverage under the modification to the Blanket Section 401 WQC. The Applicant could be the Owner or Operator.

Comment No. 16: If no e-permitting NWP Blanket WQC Notification compliance monitoring forms (i.e. visual monitoring and water quality monitoring) need to be submitted to DOH but they must be kept in a nearby field office? Is the final summary reports with all monitoring data still required? Is there a period of time that the monitoring data must be kept? Are only non-compliances reported to USACE? Will other compliance submittals listed in 5b. WQC0901.FNL.18 still required to be made to DOH (Notification for in-water construction commencement and completion in addition to the above)?

Response to Comment No. 16: The final summary report with all monitoring data that was required in the previous Blanket Section 401 WQC is no longer required. All records demonstrating compliance with the Blanket Section 401 WQC must be maintained at the project site or nearby field office for the duration of the project. Only non-compliances are reported to the USACE. Compliance submittals required in the previous Blanket Section 401 WQC are no longer required.

Comment No. 17: Condition 3.e of the modification to the Blanket Section 401 WQC requires that the activities will not permanently interfere or become injurious to any designated uses and/or existing uses of the receiving State water. How is the term "permanent " defined, e.g. is it defined in HAR chapter 11- 54?

Response to Comment No. 17: The term “permanent” is not defined in HAR Chapter 11-54. The term “permanent” in Condition 3.e of the modification to the Blanket Section 401 WQC is intended to mean after construction is complete. Condition 3.e of the modification to the Blanket Section 401 WQC was revised for clarification purposes.

Comment No. 18: Condition 3.g of the modification to the Blanket Section 401 WQC requires, before the start of activities, a Solid Waste Disclosure Form for Construction Sites be completed and returned to DOH’s Solid and Hazardous Waste Branch, Office of Solid Waste Management. We assume that "start of activities" means prior to start of construction/activity rather than prior to disposal; is this correct?

Response to Comment No. 18: “Start of activities” means prior to the start of any activity that will be covered under this modification to the Section 401 WQC.

Comment No. 19: The BMPs in USACE POH Regional Conditions appear to be feasible and practicable. If this new 2/28/20 Letter no longer requires Blanket Certifications to include development of a BMP plan and AMAP; we assume that there will be no requirement for the Applicant/Owner to conduct pre-, during- and post-construction water quality monitoring; is this correct?

Response to Comment No. 19: Yes, that is correct.

Comment No. 20: Condition 3.p of the modification to the Blanket Section 401 WQC contains requirements for projects involving dredging and excavation. Assume this applies to NWP 3, NWP 19, NWP 35 etc. Are there any additional criteria?

Response to Comment No. 20: It applies to any project involving dredging and excavation, which could include NWPs 3, 19, and 35. See, also, our Response to Comment No. 8. Other requirements that apply are stated in the rest of Condition No. 3 of the modification to the Blanket Section 401 WQC.

Comment No. 21: What is the Applicant expected to check for via the iHEER "Viewer" if the proposed action will overlap with an identified site? This is not entirely clear. For Pearl Harbor, there are several sites in-water with contaminated sediment that do not appear to be indicated in the viewer.

Response to Comment No. 21: The Applicant is expected to check the iHEER Viewer for existing incidents and records. If there is overlap or contaminated areas that do not appear in the Viewer, the Applicant is required to contact the HEER Office under Condition 3.p(2) of the modification to the Blanket Section 401 WQC.

Comment No. 22: Is the applicant required to contact the HEER office via phone AND the E-permitting Form, or only via one method? And is this the case only when the project site with known contaminated soil, vapor and/ or ground water overlaps with a HEER Office site as identified in 3p(l)? Or does this requirement apply to all project sites with Applicant / owner known contaminated soil, vapor and/ or groundwater? Does the term "soil" include sediment on the seafloor?

Response to Comment No. 22: The Applicant is required to do both methods of notification for all projects with known contaminated soil, vapor, and/or groundwater. The term "soil" includes sediment on the seafloor. For clarification purposes, Condition 3.p(2) of the modification to the Blanket Section 401 WQC was revised to include the term "sediment."

Comment No. 23: Treated lumber [in Condition 3.q(2)]; we understand it should be avoided for projects involving moorings. How about other activities, e.g. pilings for projects covered by e.g. a NWP 3 or LOP?

Response to Comment No. 23: Condition 3.q(2) only applies to projects involving moorings. All projects covered under the modification to the Blanket Section 401 WQC must comply with condition 3.d, which requires all material(s) placed or to be placed in State waters to be free of waste metal products, organic materials, debris, and any pollutants at toxic or potentially hazardous concentrations to aquatic life as specified in HAR 11-54-4(c). [Treated lumber cannot be used for pilings or projects covered, for example, by NWP 3 or LOP, if it would result in a violation of HAR 11-54-4(c).]

Comment No. 24: Assuming the 2/28/20 letter supersedes the previous WQC0901.FNL.18, and assuming the interpretation is correct that the Blanket Certification no longer requires compliance with the AMAP and Compliance Reporting Requirements, might this affect the USACE NWP 2-7, NWP 9-14, NWP 18 - 19, NWP 28 and LOP USACE application process for the Applicant? Will the Applicant be required to provide additional information to USACE currently not required for USACE to be able to provide DOH verification that Blanket Certification conditions have been met?

Response to Comment No. 24: The modifications to the Blanket Section 401 WQC will streamline the USACE NWP process. All of the requirements for coverage are included in the modification to the Blanket Section 401 WQC. There are no additional requirements. The Applicant is not required to provide additional information. USACE issues, at its sole discretion, verifications and authorizations for projects or activities that qualify for coverage in Condition 2.b of the Modified Blanket Certification. DOH will not provide verification emails as was done in the previous WQC0901.FNL.18.